

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONALD HOLLOWAY,

Defendant.

No. CR-02-110-FVS

ORDER

THIS MATTER came before the Court pursuant to the defendant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, Ct. Rec. 24; motion for appointment of counsel, Ct. Rec. 25; and motion to amend his § 2255 motion, Ct. Rec. 26. The Court has reviewed the entire case file and is prepared to rule.

BACKGROUND

On September 18, 2002, the defendant pleaded guilty to the crime of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). Pursuant to the plea agreement, the defendant stipulated to being a Career Offender pursuant to U.S.S.G. § 4B1.1. Based on that stipulation, the government and the defendant also stipulated that the defendant's base offense level was 24. At the time of sentencing, the Court granted the defendant a 3-level reduction for acceptance of responsibility and timely entrance of a guilty plea. The Court determined that the defendant's guideline range was 77-96 months. The defendant stipulated in the plea

1 agreement to a sentence at the high end of the applicable guideline
2 range and to a lifetime term of supervised release. On September 20,
3 2002, the Court sentenced the defendant to 96 months incarceration
4 and a lifetime term of supervised release. The defendant did not
5 appeal his sentence. He now moves to vacate his sentence pursuant to
6 28 U.S.C. § 2255.

7 **DISCUSSION**

8 The defendant asserts two claims in his § 2255 petition: 1)
9 ineffective assistance of counsel, and 2) a violation of his Fifth
10 and Sixth Amendment rights in light of the Supreme Court's decisions
11 in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), and *Apprendi v. New*
12 *Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). The defendant also
13 moves to amend his petition to allow him to challenge the legality of
14 his lifetime term of supervision.

15 **A. Leave to Amend**

16 A section 2255 motion filed by a federal prisoner is not a
17 proceeding in the original criminal prosecution, but is instead an
18 independent civil suit. *Heflin v. United States*, 358 U.S. 415, 418
19 n.7, 79 S.Ct. 451, 453 n.7, 3 L.Ed.2d 407 (1951). As such, it is
20 governed by the rules governing civil proceedings. Pursuant to Rule
21 15(a) of the Federal Rules of Civil Procedure, leave to amend
22 pleadings by a district court "shall be freely given when justice so
23 requires." Fed.R.Civ.P. 15(a); see also Fed.R.Civ.P. 7(b)(2) (making
24 the rules applicable to the form of pleadings also applicable to
25 motions). Thus, the grant or denial of an opportunity to amend a
26 section 2255 motion is within the discretion of the Court. Moreover,

1 principles governing *pro se* matters oblige the Court to relax
2 procedural rules in favor of the *pro se* petitioner. See *Hainers v.*
3 *Kerner*, 404 U.S. 519, 521, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972)
4 (pro se complaints held to "less stringent standards than formal
5 pleadings drafted by lawyers"). Accordingly, the Court grants the
6 defendant leave to amend his § 2255 motion to include his third claim
7 for relief as set forth in his motion to amend, Ct. Rec. 26. The
8 Court's review of the defendant's § 2255 motion shall include the
9 defendant's claim challenging the legality of his lifetime term of
10 supervised release.

11 ***B. Grounds for Relief***

12 Under 28 U.S.C. § 2255, a federal prisoner may move the court to
13 vacate, set aside, or correct his or her sentence on the grounds that
14 (1) the sentence was imposed in violation of the Constitution or laws
15 of the United States, (2) the court was without jurisdiction to
16 impose such sentence; or (3) the sentence was in excess of the
17 maximum authorized by law. "Unless the motion and the files and
18 records of the case conclusively show that the prisoner is entitled
19 to no relief, the court shall cause notice thereof to be served upon
20 the United States attorney...." 28 U.S.C. § 2255. However, the
21 Court may *sua sponte* dismiss the motion if "it plainly appears from
22 the face of the motion ... that the movant is not entitled to relief
23 in the district court." Rule 4(b), Rules Governing Section 2255
24 Proceedings For the United States District Courts.

25 1. *Blakely v. Washington*

26 Pursuant to *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the

1 defendant contends that his sentence violates his constitutional
2 rights under the Fifth and Sixth Amendments. The defendant asserts
3 that *Blakely* requires that "any fact which enhances a defendant's
4 sentence beyond a maximum (as d[e]fined by *Blakely*) ... must be
5 charged in the indictment, submitted to a jury and proven beyond a
6 reasonable doubt." The defendant's argument is based on two
7 misconceptions. First, the defendant appears to misunderstand part
8 of the Supreme Court's ruling in *Blakely*. The statutory maximum "is
9 the maximum sentence a judge may impose solely on the basis of the
10 facts reflected in the jury verdict or **admitted by the defendant,**"
11 without finding any additional facts. *Blakely*, 124 S.Ct. at 2537
12 (emphasis added). Second, the defendant appears to misunderstand the
13 basis upon which the Court imposed the defendant's sentence. The
14 defendant assumes his base offense level was increased based on the
15 facts he admitted in the statement of facts section of the plea
16 agreement. However, the defendant's base offense level was increased
17 because he stipulated to being a Career Offender pursuant to U.S.S.G.
18 § 4B1.1. The Court could not have sentenced the defendant as a
19 Career Offender unless he had at least two prior felony convictions
20 of either a crime of violence or a controlled substance offense.
21 U.S.S.G. § 4B1.1(a). The defendant stipulated, and the Court found
22 after careful review, that the defendant qualified as a Career
23 Offender based on his prior convictions for second-degree child
24 molestation, third-degree child molestation, and manufacturing
25 marijuana. The defendant was sentenced solely on his own admissions;
26 the Court did not make any findings other than those to which the

1 defendant stipulated in the plea agreement. Therefore, *Blakely* is in
2 applicable.

3 The defendant might be trying to argue he was entitled to have a
4 jury determine whether he qualified as a Career Offender, and that
5 the Court violated *Blakely* by sentencing him as a Career Offender
6 based upon prior convictions whose character had not been determined,
7 beyond a reasonable doubt by a jury. However, this contention is
8 foreclosed by *Cook v. United States*, 386 F.3d 949 (9th Cir. 2004)
9 (noting that *Blakely* is not retroactive to cases on collateral
10 appeal).

11 Even if *Blakely* did apply retroactively, the defendant would
12 face an additional obstacle. As the Ninth Circuit observed recently,
13 *Blakely* "explicitly preserve[s] its prior holding in *Apprendi v. New*
14 *Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and *Almendarez-Torres v.*
15 *United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998), that a sentencing
16 enhancement based on a defendant's prior conviction does not have to
17 be presented to a jury[.]" *United States v. Quintana-Quintana*, 383
18 F.3d 1052, 1053 (9th Cir. 2004). Therefore, even if *Blakely* was
19 retroactive, it would not support the defendant's contention that the
20 Court violated his constitutional rights by sentencing him as a
21 Career Offender.

22 2. Supervised Release

23 The defendant also argues that his lifetime term of supervised
24 release is illegal because he does not qualify under 18 U.S.C.
25 2332(b)(g)(5)(B). However, this is not the statute under which the
26 Court sentenced the defendant to a lifetime term of supervised

1 release. Pursuant to 21 U.S.C. § 841(b), the Court properly
2 exercised its authority to sentence the defendant to a lifetime term
3 of supervised release. Moreover, the defendant stipulated in his
4 plea agreement to a term of supervised release for life.

5 3. Ineffective Assistance of Counsel

6 Additionally, the defendant claims his counsel was ineffective
7 for allowing the defendant to enter a plea agreement in which he
8 admitted facts supporting the court's sentencing enhancement. The
9 defendant acknowledges that his counsel did not know at the time of
10 the defendant's sentencing hearing that, pursuant to *Blakely*, the
11 defendant had a right to have a jury determine all sentencing
12 factors. The test for ineffective appellate-assistance claims is set
13 forth in *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d
14 756 (2000). The defendant must first demonstrate he suffered
15 prejudice. *Smith*, 528 U.S. at 288-89, 120 S.Ct. at 766. Since
16 *Blakely* does not support the defendant's claims for relief, even if
17 it did apply retroactively, the defendant has not demonstrated that
18 he suffered any prejudice. Therefore, the Court determines that the
19 defendant's claim for ineffective assistance of counsel is without
20 merit and shall be dismissed.

21 **C. Appointment of Counsel**

22 A petitioner has no constitutional right to counsel in federal
23 habeas corpus proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555,
24 107 S.Ct. 1990, 1993-94, 95 L.Ed.2d 539 (1987); *Bonin v. Vasquez*, 999
25 F.2d 425, 429 (9th Cir. 1993); *Moran v. McDaniel*, 80 F.3d 1261, 1271
26 (9th Cir. 1996). Nonetheless, the Court may appoint counsel for a

1 person seeking post-conviction relief when the "interests of justice
2 so require". 18 U.S.C. § 3006A(a)(2)(b). To satisfy this standard,
3 the defendant must demonstrate "the case is so complex that due
4 process violations will occur absent the presence of counsel."
5 *Bonin*, 999 F.2d at 428-29 (interpreting identical language in earlier
6 version of § 3006A).

7 The appointment of counsel for a person seeking post-conviction
8 relief is discretionary unless the Court conducts an evidentiary
9 hearing on the petition. See Rules-Section 2255 Proceedings 8(c) ("If
10 an evidentiary hearing is required, the judge shall appoint counsel
11 for [an indigent] movant...."); *United States v. Duarte-Higareda*, 68
12 F.3d 369, 370 (9th Cir. 1995) (if petitioner remains indigent at time
13 of hearing, failure to appoint counsel for evidentiary hearing is
14 clear error). A district court must grant an evidentiary hearing for
15 a section 2255 motion "[u]nless the motion and the files and records
16 of the case conclusively show that the prisoner is entitled to no
17 relief." *U.S. v. Chacon-Palomares*, 208 F.3d 1157, 1159 (9th Cir.
18 2000) (quoting 28 U.S.C. § 2255) (internal quotation marks omitted).
19 "Evidentiary hearings are particularly appropriate when 'claims raise
20 facts which occurred out of the courtroom and off the record.'" *Id.*
21 (citations omitted). Thus, no evidentiary hearing is required where
22 the petitioner's allegations are not based on facts outside of the
23 record before the court. *Doganieri v. United States*, 914 F.2d 165,
24 168 (9th Cir. 1990).

25 Additionally, because a habeas petition is civil, a district
26 court may exercise its discretion and appoint counsel for an indigent

1 petitioner pursuant to 28 U.S.C. § 1915(e)(1). See *United States v.*
2 *\$292,888.04 in United States Currency*, 54 F.3d 564, 569 (9th Cir.
3 1995) (former statute § 1915(d)). Section 1915(e)(1) is essentially
4 the same as former 18 U.S.C. § 1915(d). Thus, the same standard
5 should apply.

6 Under former § 1915(d), counsel could be appointed only in
7 "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017
8 (9th Cir. 1991). "A finding of exceptional circumstances requires an
9 evaluation of both the likelihood of success on the merits and the
10 ability of the petitioner to articulate his claims *pro se* in light of
11 the complexity of the legal issues involved." *Wilborn v. Escalderon*,
12 789 F.2d 1328, 1331 (9th Cir. 1986) (citations omitted).

13 In the present case, the Court determines that it is unnecessary
14 to appoint counsel for the defendant. First, the interests of
15 justice do not require the appointment of counsel because the
16 defendant's case is not legally or factually complex. Second, the
17 defendant has not presented any exceptional circumstances warranting
18 appointment of counsel under 28 U.S.C. § 1915. He "demonstrated
19 sufficient writing ability and legal knowledge to articulate his
20 claim." *Terrell*, 935 F.2d at 1017. Third, the defendant has not
21 established the need for an evidentiary hearing. The motions and
22 records before the Court establish conclusively that the defendant is
23 entitled to no relief.

24 CONCLUSION

25 The Court determines that the defendant's § 2255 motion, as
26 amended, should be denied. For the reasons specified above, the

1 defendant is not entitled to the relief he requests in his original
2 or his amended § 2255 motion. Furthermore, the Court determines that
3 the defendant's motion for appointment of counsel should be denied.
4 The defendant has not shown that an evidentiary hearing is necessary,
5 nor has he shown it is appropriate to appoint counsel under either of
6 the discretionary statutes discussed above. Accordingly,

7 **IT IS HEREBY ORDERED:**

8 1. The defendant's Motion to Amend, **Ct. Rec. 26**, is **GRANTED**.

9 2. The defendant's Motion to Vacate, Set Aside or Correct his
10 Sentence under 28 U.S.C. § 2255, **Ct. Rec. 24**, is **DENIED**.

11 3. The defendant's Motion to Appoint Counsel, **Ct. Rec. 25**, is
12 **DENIED**.

13 4. The defendant's Motion to Compel, **Ct. Rec. 28**, is **GRANTED**.

14 **IT IS SO ORDERED.** The District Court Executive is hereby
15 directed to enter this Order and furnish a copy to the **defendant**.

16 **DATED** this 19th day of April, 2005.

17 s/ Fred Van Sickle
18 Fred Van Sickle
19 Chief United States District Judge
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